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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 100

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, ATKINSON-KIER, *Petitioners*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the Court of Claims

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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1

The Solicitor General's contention is that the decisions of this Court in respect of Article 15 dispose of this case. This must be based on the assumption either that the distinguishing facts of this case should be suppressed or compressed so as to fit into the frame of those decisions or that those decisions should be expanded by construction to cover the facts of this case.

This contention was not to be unexpected. The decisions of this Court are all one way—toward strictest literal construction. For seven years, the Solicitor General's office has contested in this Court practically every original line of interpretation of the meaning of Article 15 (and other similar provisions in government construction contracts) of the Court of Claims by which that court—up to this case—has striven to abate some of the injustices inherent in the Article; all Government requests for review have been granted; and all decisions reviewed have been reversed. *United States* v. *McShain*, cert. granted, 307 U. S. 619 (1939), reversed, 308 U. S. 512 (1939); *United States* v. *Callahan Walker Constr. Co.*, cert. granted, 316 U. S. 656 (1942), reversed, 317 U. S. 56 (1942); *United States* v. *Rice*, cert. granted, 316 U. S. 653 (1942), reversed, 317 U. S. 61 (1942); *United States* v. *Brooks-Callaway Co.*, cert. granted, 317 U. S. 615 (1942), reversed, 318 U. S. 120 (1943); *United States* v. *Blair*, cert. granted, 320 U. S. 720 (1943), reversed, 321 U. S. 730 (1944); *United States* v. *Beuttas*, cert. granted, 323 U. S. 702 (1944), reversed, 324 U. S. 768 (1945); *United States* v. *Joseph A. Holpuch Co.*, cert. granted, — U. S. —, Nos. 696 and 697, October Term, 1945 (1946), reversed, — U. S. —, Nos. 696 and 697, October Term, 1945 (1946). On the other hand, no petition for certiorari to review a decision by the Court of Claims relating to the effect of Article 15 presented by a claimant has ever been granted. *Seeds* v. *United States*, 92 C. Cls. 97; cert. den. 312 U. S. 697 (1941); *John M. Whelan & Sons* v. *United States*, 98 C. Cls. 601; cert. den. 319 U. S. 770 (1943); *Globe Indemnity Co.* v. *United States*, 102 C. Cls. 21; cert. den. 324 U. S. 852 (1945); *Standard Accident Insurance Co.* v. *United States*, 102 C. Cls. 770; cert. den. 325 U. S. 870 (1945); *George F. Driscoll Co.* v. *United States*, 104 C. Cls. 762; cert. den. — U. S. — No. 1034, October Term, 1945 (1946). The Solicitor General evidently takes the view that, since this Court has consistently corrected the Court of Claims' attempts to

discover some implications of fairness in the Article, this Court can hardly be expected to find fault with the court below when at last it decides in effect that the Article must be followed strictly to its very letter. It is our view, however, that this Court has, to some extent, recognized that this Article may have "interstices that secrete relevant implications" of fairness. We contend that the decisions of this Court do not shut the door on this case but keep it ajar for consideration of the very questions raised by the facts in this case.

We are bound to think also that this Court will be reluctant to expand its law to the extreme the Solicitor General presumes it will go. The law of Article 15 has been made by this Court; Congress has never authorized arbitration of its contracts; and it may be questioned whether Congress will ever regard with approval the Article 15 system. Moreover, whatever may be said in favor of this Article, this also can be said, as can be said of any method of covert settlement of demands by or against the Government: it is an invitation to official corruption from the humble inspector up and, at best, it necessitates honest and prudent contractors to "load" their bids.

2

The Government's brief, in defense of Mr. Ickes' conduct, seizes, as did the court below, upon counsel's statement of February 16, 1939, that the promised procedure for handling petitioners' appeal—*promised* by Solicitor Margold after 15 months' pressure on Mr. Ickes—was "entirely agreeable". The brief regards this statement as decisive. It disregards all the evidence of Mr. Ickes' unfairness and breach of duty which had been persisted in for 15 months at the time counsel made the statement and quotes with approval the statement in the opinion of the court below that "Counsel did not then think that the plaintiffs could not have a fair hearing on the appeal and, as we have con-

cluded, nothing occurred thereafter which was a reason for changing his mind".

If the text of counsel's statement be examined, certainly if it be examined in the light in which it was made, it will be seen that that statement could only mean that counsel was agreeable to Solicitor Margold's promised hearing as the best that he could get. This is far from saying that counsel agreed, or thought, that the promised hearing would be fair, or that Mr. Ickes was fair, or that Mr. Ickes' decisions would be fair. If petitioners were entitled to a hearing at all, then any hearing, however unfair, would have been justly advantageous to the petitioners: it might have curtailed Mr. Ickes' indefinite *locus poenitentiae;* it would have revealed to petitioners some knowledge of the Government's evidence; and it would have made a record which would have served to assist petitioners on their way to the courts.

What did occur thereafter?

(1) The fiasco at the Department of Justice staged by Solicitor Margold (R. 94, 117, 126, 174-175, 179-180).

(2) Solicitor Margold's visit to the Pacific Coast on February 11 for a "few weeks" which lengthened into months extending beyond the time the suit was brought (R. 94-95).

(3) Counsel's letter to the Secretary (February 27, 1939) complaining about the Department of Justice farce and the Secretary's lack of appeal procedure (R. 94-95).

(4) Acting Secretary Burlew's reply (March 9) saying that, after all, nothing had resulted except some delay in fixing a date and that "there now exists *no reason* why a date may not be set for the inauguration of the hearing", adding, "Accordingly, *in the near future*, you will be notified . . ." (italics supplied) (R. 95, 181).

(5) Failure to notify counsel as to a date either "in the near future" or at any other time (R. 95).

(6) And there also "occurred thereafter" Mr. Ickes' testimony at the hearing whereby out of his own mouth he demonstrated his utter unfairness and his insensibility to his obligation from first to last (R. 184-217).

3

The Government's brief, by misleading erroneous statements, undertakes to refute petitioners' contention that when suit was brought Mr. Ickes had had 17 months for taking up the appeals. It thus attempts to show that instead of 17 months Mr. Ickes had had only four. It is stated (Brief, 15-16):

> "Nor is there merit to petitioners' claim that the amount of time which elapsed after the filing of their appeal, without actual hearings having been begun thereon, warranted its abandonment. Petitioners filed their appeal on January 4, 1939 (Fdg. 21, R. 81-82, 170). They filed their suit in the court below May 1, 1939 (Fdgs. 24, 25; R. 1, 84-85, 96, 181), less than four months thereafter."

And footnote 5, page 16, gives emphasis to the erroneous statements. Such statements ignore the averments of the petition (pp. 21-24), supported by authentic documentary evidence, as to appeals made more than a year before the "appeal" of January 4, 1939 and also ignore the telling testimony of Mr. Harper who was speaking for the contracting officer (R. 107-108).

4

The Government's brief also takes the erroneous position that the petitioners rested their charge of the Secretary's bad faith solely upon his acrimonious communications to counsel. It states (pp. 14-15):

> "Petitioners appear to found their charge of bad faith on the part of the Secretary upon an exchange of some-

> what acrimonious letters and telegrams which took place between the Secretary and petitioners' counsel."

Petitioners rest their charges on other equally substantial grounds but these the court below, and now the Solicitor General, have chosen to ignore.

Petitioners here reiterate their charge of Mr. Ickes' bad faith and found it not only upon the Secretary's acrimonious communications but also upon the entire record evidence, including his own testimony which clearly shows—

(A) That Mr. Ickes was disqualified by his lack of fairness to pass upon the appeals (Pet. 3-4, 7);

(B) That Mr. Ickes never had an adequate appeal procedure, if, indeed, he had any at all (Pet. 4; Brief, 20-24);

(C) That Mr. Ickes himself breached his obligation to these petitioners (Pet. 7-9; Brief, 20-24).

Conclusion

The petitioners have claims which, upon the facts as found by the Commissioner (who died before completing his report on some of the causes of action), reach several million dollars. They earnestly contend that they have been denied access to the Court of Claims unjustly and unlawfully.

Respectfully submitted,

SAMUEL T. ANSELL,
Counsel for Petitioners

August 14, 1946.